No. 86-1570

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE McKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To the United States Court Of Appeals
For the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. Basis for Motion to Seal Limited to Co-defendant Mitchell

On page three and in footnote ten in the Brief for the United States in Opposition, the Government inaccurately states that the superseding indictment was sealed based upon the prosecutor's representations to the Magistrate that all defendants might flee. The only factual basis for sealing either of the indictments was Assistant United States Attorney Deichert's oral testimony given on October 19, 1982, before United States Magistrate Feldman. Mr. Deichert referred only to the possibility that defendant David Mitchell might flee (1SR2). In his testimony, Mr. Deichert never mentions any defendant other than Mitchell by name.

It is clear that at the time the indictments were sealed, the only factual

basis given for secrecy was the necessity to apprehend Mitchell. It was on that basis only that the sealing order could validly have been issued. Further, it was only on that basis that the Government could, in good faith have continued to allow the indictment to remain sealed. The facts surrounding the Government's locating Mitchell, his arrest, the lack of further need for sealing are detailed in the Petition for Certiorari, pages four through seven.

2. Efforts to Locate Petitioner

On pages four and eight and in footnotes six and nine of the Government's Brief in Opposition, attempts are made to justify the Government's inadequate efforts to locate the Petitioner. The Government's position that substantial efforts were made is not supported by the record in the case. The

Government freely admits in footnote six that the Drug Enforcement Administration lacked very basic facts about the Petitioner which with their technology and basic common sense could easily have been obtained.

For example, the case agent never bothered to obtain driver's license pictures for any of the Lawrence McKinleys in the Atlanta area from the State of Georgia. If he had done so, he could have shown them to his star witness Glenna Mitchell who could easily have identified Petitioner (R2-103-104). The license, of course, would have furnished a date of birth and legal residence. Further, the agent testified he would probably not have bothered McKinley's mother, even had he known where she lived (an inquiry he apparently carefully avoided making) (R2-67).

Finally, the Government apparently

never even bothered to investigate the telephone numbers Glenna Mitchell had for McKinley and his brothers to see if more information could be gleaned about him from that source (R7-181-184) (Cf. R7-95-98; R8-122-123).

Further, the case agent did not bother to check McKinley through the so-called EPIC system (R2-73-74). Although he put McKinley into NADDIS, he did not put him into TECS (Custom's computer), primarily because he has had some bad experiences with Customs and felt he did not have sufficient information that would allow TECS to accept the entry (R2-54-57; 91-110; 113). However, a Customs agent testified that the latter assumption was incorrect (R2-87, et seq.). The failure to place Petitioner in TECS is extremely significant, as he cleared the United States Customs numerous times between the indictment and

his arrest (R2-58), using a passport with his address on it (R2-72). Therefore, while a TECS entry without a birthdate and/or social security number would not have resulted in McKinley's arrest by Customs, it would have caused them to notify the DEA of his entry into the country with an Atlanta area address, and they could then have gotten a copy of the passport picture to show to Glenna Shipman.

It is respectfully submitted that the efforts on the part of the Government to locate Petitioner were at best skeletal and were certainly not substantial, diligent nor in good faith. Therefore, the continued sealing past the statute of limitations was in no way proper.

3. Petitioner was Never a Fugitive

On pages three, four, eight and in footnotes four, nine, ten of the Brief in

Opposition, the Government claims that McKinley was a fugitive during the entire period between the indictment and his arrest. At the outset it must be noted it is a logical and semantical impossibility for Petitioner to have been a "fugitive" during the first sixteen months of this period, as the indictment was sealed during that time. Simply stated, one can hardly flee from charges of which one is unaware.

Of primary importance is the fact that Petitioner does not complain about the Government's actions after the unsealing of the indictment. Nothing which occurred during the period after the unsealing has any relevance to the issues contained in this Petition. Witness Bukky, McKinley's estranged girlfriend, gave information only as to the period after the indictment was unsealed. Therefore, her entire testimony is of no rele-

vance for purposes of this Petition as it in no way proves Mr. McKinley was a "fugitive" during the sixteen months the charges were concealed from the world. Moreover, nowhere in its decision did the district court rely on Bukky's testimony (Appendix 4a-11a), nor did the Government rely on it in its briefs to the district court. It is inappropriate for the Government to ask this Court to do so now.

Before this Court can base any decision in Petitioner's case on Bukky's testimony, it is respectfully submitted that a review of her testimony demonstrates why neither the district court nor the Government in its submissions to that court relied on it: her testimony is so inherently incredible as to be totally unworthy of belief. For example:

(a) Bukky's claim that McKinley told her in March or April, 1984 that he was

aware of the indictment (relied upon by the Government at page 4, 6, 8 and 9 of its Brief) is utterly incredible because she also claims he told her at that time that the charges had already been dismissed as to the other defendants. The district court's order dismissing the indictment as to the other defendants (1 SR 1-3) was not entered until June 8, 1984, some months later.

(b) Prior to any reliance being put on Bukky's mental stability and credibility, her entire testimony must be reviewed (R3-87-143). For example, her testimony includes such claims as:

(1) "I found the truth. The Lord led me to the truth. He always does." The Lord led her to the truth about Larry McKinley: "Every lie that he told me, yes, he did." R3-15).

(2) She received "a vision" from the Lord about Larry McKinley's go-

ing to a "naked bar." (R3-106) (R3-111).

(3) She has "been chosen by God to be his vessel": "Yes, I believe that God chooses persons, places and things just like Satan does. Just like the negative forces. There's two forces on the planet, negative and positive." (R3-115).

(4) She believes that she is "The Queen of the Realm." (R3-117) (R3-134).

(5) She lists her return mailing address on her correspondence as "Christians Beloved Hearts, One Lord Jesus, Golden Gates Heaven" (R3-128).

(6) She was engaged to Lee Majors, "The Six Million Dollar Man" but could not marry him because Petitioner McKinley allegedly gave her venereal disease. (R3-135).

The Government's suggestion that this Court give credence to this witness'

testimony demonstrates the weakness of their true reasons for the Rule 6(e)(4) sealing.

4. No Testimony in Record as to Petitioner's Having Hidden Cash

In footnote four of the Brief in Opposition, the Government states: "The prosecutor noted that both Petitioner and Mitchell had easy access to overseas travel and to cash resources that had been secreted outside the country." A review of the record establishes that nowhere does it contain specific information that Petitioner had such resources secreted outside the country. The only testimony that alludes to these facts is in the ex post facto testimony of the prosecutor, which broadly alleged that all of the defendants, but particularly Mitchell, had such resources. Mr. Deichert never specified any basis for his allegations.

5. Essential Protections Afforded by Rule 6(e)(4)

The Government in its argument neglects the fact that the procedures governing the sealing of an indictment afford a defendant two essential protections in addition to the requirement that the sealing be to fulfill a legitimate prosecutorial need. First, the sealing must be in judicial rather than prosecutorial hands. United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985). Second, the Government may not request that the sealing of an indictment extend past the expiration of the statute of limitations for more than a reasonable time. United States v. Edwards, 777 F.2d 644 (11th Cir. 1985).

All of the limitations that are placed on sealing of indictments mentioned herein serve to protect Rule 6(e)(4) sealings from prosecutorial

exploitation and a defendant from a stale prosecution. In the instant case all the protective limitations were ignored and hence, violated. First, the indictment remained sealed for seven months past the stated legitimate need for sealing -- the arrest of Mitchell. (Supp.R. Vol. 2, pp. 3-7). Second, the arrest of Mitchell was not communicated to the sealing magistrate. No steps were taken at that time by the Government to obtain authorization for the continued sealing. By these actions, the prosecution essentially placed continued sealing under their control and not that of the magistrate. Further, the indictment was unsealed seven months after Mitchell's arrest only because of the voluntary mass surrender of five of the defendants (R.Vol.1).

Throughout its Brief, the Government contends McKinley was a fugitive. The record does not support this contention.

On page eight of its Brief, the Government states their belief that McKinley was "evading apprehension" because he had false identification documents in his possession when he was located. This fact alone, the Government goes on to reason, justified the need for the sealing past the statute of limitations.

The Government's position is clearly without merit as it is an after the fact attempt to absolve themselves of the lack of good faith and diligent efforts to locate the Petitioner as the district court found in its original order as to Petitioner's co-defendants. See, United States v. Mitchell, 769 F.2d 1544 (11th Cir. 1985). The Government found the false identification at the time of McKinley's arrest, did not know of it at the time of the sealing, and hence was unable to communicate these facts to the sealing magistrate. Assuming arguendo that McKin-

ley was deemed a fugitive because of the false identification, these facts were not known or used to justify the sealing order. The Government cannot justify a sealing order after the fact just as it is prevented from gathering the facts for justification of a search and seizure after it has been carried out. See, Aguilar v. Texas, 378 U.S. 410, 413, fn. 3 (1969).

6. The Prejudice Requirement

On pages six through nine in its Brief in Opposition, the Government argues that Petitioner must show substantial and actual prejudice in order to prevail on the motion to dismiss. The detailed reasons stated in the Petition for Writ of Certiorari demonstrate that this standard is all but impossible to meet. The standard effectively denies an aggrieved defendant any protection

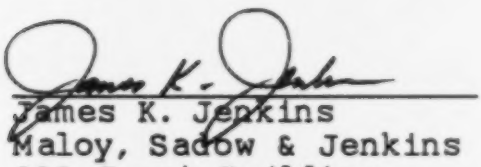
against or redress from stale prosecutions and negligent or willful violations of Rule 6(e)(4) sealing orders. In addition, this standard destroys the other essential limitations which are at the heart of the Rule 6(e)(4) procedures.

It is imperative that this Court lend guidance in the area of administration and use of Rule 6(e)(4) to seal indictments, especially when the period of sealing extends past the applicable statute of limitations. Careful consideration is needed to address the devastating effects the actual prejudice requirement has not only on the rights of this Petitioner, but in halting the continued misuse and misconduct committed in this area.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,



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